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Abdul Halim bin A Tambi v Yong Kim Moon & Ors

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-35–03 OF 2020
TEE GEOK HOCK JC
12 JANUARY 2021

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Tort — Road accident — Liability and quantum — Sessions court judge held first respondent 80% liable, appellant 20% liable and second and third appellant not liable — Sessions court awarded damages — Appellant appealed against decision — Whether trial judge's decision on liability ought to be disturbed or interfered — Whether appellant's appeal on quantum ought to be allowed

D

This was an appeal by the appellant ('plaintiff') against the decision of the learned sessions court judge on liability and quantum in a judgment delivered after the full trial of the personal injury action. The plaintiff sued three respondents ('defendants') in the sessions court in respect of a road accident. In the sessions court, the learned sessions judge held that the first defendant shall bear 80% liability for negligence in causing the road accident, the plaintiff was 20% responsible in contributory negligence, while the second and third defendants were not liable at all. In the sessions court, the learned trial judge decided that the quantum of damages was a total amount of RM493,988.40, being comprised of RM348,500 as general damages and RM145,488.40 as special damages. Hence, this appeal. On quantum issues, the plaintiff had appealed against the sessions court's quantum of awards on the following items of damages: (a) general damages for personal injuries; (b) special damages; (c) cost of a maid; (d) cost of buying a 'Vellfire'; (e) loss of earnings and allowance; (f) loss of earning capacity; (g) lost of renovation of the plaintiff's house; (h) the plaintiff's pre-trial and post-trial expenses as a result of the accident; (i) interest on special damages; and (j) costs.

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Held, dismissing the appeal on liability and allowing the appeal on quantum in part:

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(1) There were reasonable explanations and justifications for the learned trial judge's factual decision on liability. This case fell below the 'plainly wrong' test for an appellate interference with the trial judge's findings of fact and the trial judge's factual decision on liability and his decision on apportionment of liability. There was no valid or sufficient basis for the court to disturb or interfere with the learned trial judge's decision on liability or his decision on apportionment of liability. Accordingly, the plaintiff's appeal on liability issues was dismissed (see paras 19–21).

I

(2) There was no error in the principles on damages referred to by the learned trial judge. The learned trial judge adequately considered and dealt with the heads of personal injuries item by items before awarding the quantum for them. There was no error in principle on the part of the learned trial judge in his assessment of the quantum of damages except for two items on special damages justified an appellate interference, namely, costs of domestic help and loss of earnings (see paras 27 & 39).

(3) The plaintiff could not in the balance of his life live his own life 100% independently and without any assistance of another person. The plaintiff could do a majority of his daily activities on his own but he needed assistance for some of his daily activities in life. In addition, the learned trial judge also erred in principle in failing to appreciate that when it came to costs of domestic help there was no necessity for specific proof of actual expenses. In the premises, the learned trial judge erred in principle in his outright dismissal of the claim for cost of domestic help. The plaintiff did not claim for cost of nursing care as such in their statement of claim and therefore the plaintiff was not allowed to pursue any claim for nursing care. An amount of RM600 per month was a reasonable amount for the cost of domestic help on partial basis for the plaintiff. Costs of future supervisory care was not regulated by the statutory provisions of the Civil Law Act 1956 and accordingly such costs of future care ought to be assessed and computed in accordance with the common law principles (see para 52).

(4) The plaintiff had failed to prove that need to buy another or separate transportation vehicle was caused by the accident or tortious act of the defendant. Further, the plaintiff had failed to prove that a Toyota Vellfire was the type and model of the transportation vehicle which was reasonably necessary for sustaining his/her wheelchair-bound activities in life. The learned trial judge was correct and/or justified in dismissing the plaintiff's claim for the cost of a Toyota Vellfire (see para 64).

(5) The contract of employment was sufficiently proved on a balance of probabilities because the plaintiff, being the other contracting party, could be considered as a maker or co-maker of the document evidencing the contract of employment. The plaintiff's oral evidence was sufficiently proved on a balance of probabilities. In the circumstances, the learned trial judge erred in principle and/or was plainly wrong when he dismissed the plaintiff's claim for loss of earnings (see para 73).

(6) The plaintiff did not submit/make any claim for loss of earning capacity. It was now not open to the plaintiff to include this claim as one of the grounds of appeal, as it was deemed to have been abandoned. Furthermore, as the plaintiff had been awarded the loss of earnings for the balance of his useful working life as from the date of accident in accordance with the statutory provisions under the Civil Law Act 1956,

any claim for loss of earning capacity would be a duplication of the award for the loss of earnings (see paras 77–78).

(7) The plaintiff had failed to prove that the learned trial judge's decisions or quantum of awards for any of these other expenses was erroneous in principle or manifestly low (see para 102).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('plaintif') terhadap keputusan hakim mahkamah sesyen yang bijaksana mengenai liabiliti dan kuantum dalam penghakiman yang disampaikan selepas perbicaraan penuh tindakan kecederaan peribadi. Plaintif menyaman tiga responden ('defendan') di mahkamah sesyen berkenaan dengan kemalangan jalan raya. Di mahkamah sesyen, hakim sesyen yang bijaksana memutuskan bahawa defendan pertama akan menanggung 80% liabiliti kerana kecuaian dalam menyebabkan kemalangan jalan raya, plaintif 20% bertanggungjawab dalam kecuaian sertaan, manakala defendan kedua dan ketiga tidak bertanggungjawab sama sekali. Di mahkamah sesyen, hakim bicara yang bijaksana memutuskan bahawa kuantum ganti rugi adalah sejumlah RM493,988.40, terdiri daripada RM348,500 sebagai ganti rugi am dan RM145,488.40 sebagai ganti rugi khas. Oleh itu, rayuan ini. Mengenai isu kuantum, plaintif telah merayu terhadap kuantum award mahkamah sesyen mengenai perkara-perkara ganti rugi berikut: (a) ganti rugi am untuk kecederaan peribadi; (b) ganti rugi khas; (c) kos pembantu rumah; (d) kos membeli 'Vellfire'; (e) kehilangan pendapatan dan elaun; (f) kehilangan kapasiti pendapatan; (g) kehilangan pengubahsuaian rumah plaintif; (h) perbelanjaan praperbicaraan dan selepas perbicaraan plaintif akibat kemalangan itu; (i) faedah atas ganti rugi khas; dan (j) kos.

Diputuskan, menolak rayuan liabiliti dan membenarkan sebahagian rayuan kuantum:

(1) Terdapat penjelasan dan justifikasi yang munasabah untuk keputusan fakta hakim bicara yang bijaksana mengenai liabiliti. Kes ini jatuh di bawah ujian 'jelas salah' untuk campur tangan rayuan terhadap penemuan fakta hakim bicara dan keputusan fakta hakim bicara mengenai liabiliti dan keputusannya mengenai pembahagian liabiliti. Tiada asas yang sah atau mencukupi untuk mahkamah mengganggu atau campur tangan keputusan hakim bicara yang bijaksana mengenai liabiliti atau keputusannya mengenai pembahagian liabiliti. Sehubungan itu, rayuan plaintif mengenai isu liabiliti telah ditolak (lihat perenggan 19–21).

(2) Tiada kekhilafan dalam prinsip ganti rugi yang dirujuk oleh hakim bicara yang bijaksana. Hakim bicara yang bijaksana telah mempertimbangkan dan menangani dengan sewajarnya bahagian kecederaan peribadi mengikut item sebelum memberikan kuantum untuk mereka. Tiada

kekhilafan dalam prinsip di pihak hakim bicara yang bijaksana dalam penilaian terhadap kuantum ganti rugi kecuali dua perkara mengenai ganti rugi khas yang mewajarkan campur tangan rayuan, iaitu, kos orang gaji dan kehilangan pendapatan (lihat perenggan 27 & 39).

(3) Plaintif tidak boleh dalam baki hidupnya menjalani kehidupannya sendiri 100% secara bebas dan tanpa bantuan orang lain. Plaintif boleh melakukan sebahagian besar aktiviti hariannya sendiri tetapi dia memerlukan bantuan untuk beberapa aktiviti hariannya dalam kehidupan. Di samping itu, hakim bicara yang bijaksana juga terkhilaf pada dasarnya kerana gagal memahami bahawa apabila melibatkan kos orang gaji tidak ada keperluan untuk bukti khusus perbelanjaan sebenar. Dengan itu, hakim bicara yang bijaksana terkhilaf pada prinsip dalam menolak secara terang-terangan tuntutan kos orang gaji. Plaintif tidak menuntut kos penjagaan kejururawatan dalam pernyataan tuntutan mereka dan oleh itu plaintif tidak dibenarkan untuk meneruskan sebarang tuntutan untuk penjagaan kejururawatan. Jumlah RM600 sebulan adalah jumlah yang munasabah untuk kos orang gaji secara separa bagi plaintif. Kos penjagaan penyeliaan masa hadapan tidak ditetapkan oleh peruntukan berkanun Akta Undang-Undang Sivil 1956 dan oleh itu kos penjagaan masa depan sedemikian harus dinilai dan dikira mengikut prinsip undang-undang biasa (lihat perenggan 52).

(4) Plaintif telah gagal untuk membuktikan bahawa keperluan untuk membeli kenderaan pengangkutan lain atau berasingan adalah disebabkan oleh kemalangan atau perbuatan tort defendan. Selanjutnya, plaintif telah gagal membuktikan bahawa Toyota Vellfire adalah jenis dan model kenderaan pengangkutan yang semunasabahnya diperlukan untuk mengekalkan aktiviti berkerusi rodanya dalam kehidupan. Hakim bicara yang bijaksana adalah betul dan/atau berasas dalam menolak tuntutan plaintif untuk kos Toyota Vellfire (lihat perenggan 64).

(5) Kontrak pekerjaan telah dibuktikan dengan secukupnya berdasarkan imbangan kebarangkalian kerana plaintif, sebagai pihak yang berkontrak, boleh dianggap sebagai pembuat atau pembuat bersama dokumen yang membuktikan kontrak pekerjaan itu. Keterangan lisan plaintif telah cukup dibuktikan berdasarkan keseimbangan kebarangkalian. Dalam keadaan tersebut, hakim bicara yang bijaksana telah terkhilaf pada dasarnya dan/atau secara jelas tersilap apabila menolak tuntutan plaintif untuk kehilangan pendapatan (lihat perenggan 73).

(6) Plaintif tidak mengemukakan/membuat sebarang tuntutan untuk kehilangan kapasiti pendapatan. Ia kini tidak terbuka kepada plaintif untuk memasukkan tuntutan ini sebagai salah satu alasan rayuan, kerana ia dianggap telah ditinggalkan. Tambahan pula, oleh kerana plaintif telah dianugerahkan kehilangan pendapatan untuk baki hayat bekerja dari

tarikh kemalangan mengikut peruntukan berkanun di bawah Akta Undang-Undang Sivil 1956, sebarang tuntutan kehilangan kapasiti pendapatan akan menjadi pertindihan award untuk kehilangan pendapatan (lihat perenggan 77–78).

(7) Plaintif telah gagal membuktikan bahawa keputusan hakim bicara yang bijaksana atau kuantum award bagi mana-mana perbelanjaan lain ini adalah terkhilaf pada dasarnya atau nyata rendah (lihat perenggan 102).]

Cases referred to

Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 4 MLJ 182; [1995] 2 MLRH 795, HC (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and Other Appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

B (a Child) (FC), Re [2013] UKSC 33, SC (refd)

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233, SC (refd)

Collector of Stamp Duties v Ng Fah In & Ors [1981] 1 MLJ 288, FC (refd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2022] 1 MLJ 1, FC (refd)

Davies and another v Powell Duffryn Associated Collieries [1942] AC 601, HL (refd)

Foong Nan v Sagadevan [1971] 2 MLJ 24, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Hussein & Anor v Maiden [1970] 1 MLJ 114, FC (refd)

Jamil bin Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217; [1984] 1 MLRA 27, PC (refd)

Jefford and another v Gee [1970] 1 All ER 1202, CA (refd)

Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock [2016] MLJU 880; [2017] 4 MLRH 370; [2016] 2 PIR 56, HC (distd)

Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)

Lee Chee Kwong v Kutiandy Thanniamalay & Anor [2016] 5 LNS 6; [2016] MLRSU 10, Sc (refd)

Lim Choon Seng v Lim Poh Kwee [2020] 5 MLJ 587, FC (refd)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)

Mohd Nizatul Azmi bin Mahamad Radzi & Anor v Rusmah bt Ahmad & Anor [2019] 1 PIR 17 (refd)

Muhammad Hanif bin Ishak (a patient and this action is brought by his father, litigation representative, Ishak bin Hashim) v Mohammad Syazwan bin Mohamad Fuad & Anor [2017] 9 MLJ 431; [2017] 1 LNS 372, HC (distd)

Murtadza bin Mohamed Hassan v Chong Swee Pian [1980] 1 MLJ 216, FC (refd)

Murugan v Lew Chu Cheong [1980] 2 MLJ 139, FC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan

Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 1 LNS 1060, FC (refd)
Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd & Anor and another [2019] MLJU 1983, CA (refd)
Rasidin Binpartorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Renhome Bricks Factory Sdn Bhd v Watah Umpin [2009] 9 CLJ 494 ; [2008] 4 MLRH 430, HC (refd)
Roshidan bin Shamsudin (suing by himself and as administrator of the estate of Muhammad Aiman Izzan bin Roshidan, deceased) v Muhammad Saimee bin Che Isa & Anor and another appeal [2019] 7 MLJ 800, HC (refd)
Safarizuan bin Mustafa v Leizaini bt Abd Gani [2018] 2 PIR 52 (refd)
Satishwaran a/l Selvaraju (suing through his personal representative M Amudavali a/p S Muthiayah) v Alsone bin Aripin and another appeal [2018] MLJU 655; [2018] MLRHU 1, HC (refd)
Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74, FC (refd)
Syarizan bin Sudirmin (a child claimed through the father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor [2010] 8 MLJ 530; [2009] 3 MLRH, HC (refd)
Takong Tabari v Government of Sarawak & Ors and Another Appeal [1998] 4 MLJ 512, CA (refd)
Tan Ah Kau v The Government of Malaysia [1995] MLJU 183; [1995] 1 MLRH 497, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, FC (refd)
Wan Anas Hamizan bin Wan Adnan & Anor v Mohd Zamri bin Sa'ari & Anor [2019] 1 PIR 30 (refd)
Wasal Construction Sdn Bhd v Boh Huat Chan Timber Products Sdn Bhd [2014] 4 MLJ 294, CA (refd)
Wong Fui Chien & 2 Ors v Chin Wen Cheng & Anor [2019] 2 PIR 31 (refd)

Legislation referred to

Civil Law Act 1956

Muhammad Sofian bin Jamaludin (A Azidin & Shahrul) for the appellant.
Andrew Khoo Kok Tsan (Khoo & Sidhu) for the first respondent.
Samreet Singh (Lovelace & Hastings) for the second and third respondents.

Tee Geok Hock JC:

INTRODUCTION

[1] The main facts and unique arguments in this appeal will remain in my memory for many years whenever I see a wheelchair or a Toyota Vellfire motor vehicle.

[2] This is an appeal by the plaintiff against the decision of the learned sessions court judge on liability and quantum in a judgment delivered after the full trial of the personal injury action.

[3] The plaintiff sued three defendants in the sessions court in respect of a road accident. In the sessions court, the learned sessions judge held that the first defendant shall bear 80% liability for negligence in causing the road accident, the plaintiff was 20% responsible in contributory negligence, while the second and third defendants were not liable at all.

PRINCIPLES OF APPELLATE INTERFERENCE

[4] In *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 the Federal Court at p 10 (MLJ); p 320 (CLJ) stated as follows:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[5] The Court of Appeal in *Wasal Construction Sdn Bhd v Boh Huat Chan Timber Products Sdn Bhd* [2014] 4 MLJ 294 states as follows:

> [20] The principles for appellate interference in the decision of the trial court was stated by the Federal Court in *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1; [2012] 6 CLJ 573 where it was held: The law on appellate intervention on findings of fact by a trial judge is trite. In this context it may be useful to refer to the case of *Multar Masngud v Lim Kim Chet and Anor* [1982] CLJ 107; [1982] CLJ Rep 237(FC), wherein it was held that an appellate court will interfere and disturb the finding of fact by the trial judge if crucial evidence had been misconstrued resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded. In the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b; [1984] 1 LNS 40 it was held that when a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of the appellate court to

intervene and correct the error lest otherwise the error results in serious injustice.

[6] In the recent Court of Appeal decision in *Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd & Anor and another* [2019] MLJU 1983, the Court of Appeal in the judgment delivered by Vazeer Alam JCA stated as follows regarding interference with the trial judge's findings of facts:

> [57] An appellate court does not readily interfere with findings of facts made by the trial court unless the trial judge had fundamentally misdirected himself, such that one may safely say that no reasonable court would have arrived at the same conclusion if it had properly directed itself and asked the correct questions (see for example: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[7] In the recent Federal Court judgment in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 the Federal Court has done a detailed and comprehensive analysis and discussion of the 'plainly wrong' test for interfering with the factual findings of the trial courts and held in the judgment delivered by Zabariah Mohd Yusof FCJ on behalf of the apex court, as follows:

> *Is there a need for 'guidelines' by the Federal Court?*
>
> [143] Should the 'plainly wrong' test be subject to guidelines and whether the 'guidelines' in *McGraddie* and *Henderson* or other guidelines be adopted by our courts?
>
> [144] Firstly, it need to be emphasized that the Supreme Court in *Henderson* was not setting any guidelines to the plainly wrong test. It merely provides a construction as to what amounts to the plainly wrong test in appellate intervention. In this regard, we find that Lord Neuberger's remarks at para 60 of *In Re B (a Child) (FC)* [2013] UKSC 33 are instructive:
>
> > When it comes to an evaluation, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal *will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation* ... (Emphasis added.)
>
> [145] This is in consonant with Lord Thankerton's dicta in *Thomas v Thomas* at p 488 that:
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> > It is obvious that the value and importance of having seen and heard the witnesses will *vary according to the class of case, and, it may be, the individual case in question*. (Emphasis added.)
>
> [146] It is important to recognise that in the United Kingdom, the view that findings of fact might not necessarily lend themselves to one singularly 'right' conclusion, has been endorsed by high authority. For one, Ward LJ in *Assicurazioni*

Generali Spa v Arab Insurance Group [2003] 1 WLR 577 CA acknowledged that:

> The trial judge's view inevitably imposes a restraint upon the appellate court, the weight of which varies from case to case. Two factors lead us to be cautious aboutinterfering. First, the appellate court recognises that judging the witness is a morecomplex task than merely judging the transcript. Each may have its intellectual component but the former can also crucially rely on intuition. That gives the trial judge the advantage over us in assessing a witness's demeanour, so often a vital factor in deciding where the truth lies. *Secondly, judging is an art not a science. So the more complex the question, the more likely it is that different judges will come to different conclusions and the harder it is to determine right from wrong. Borrowing language from other jurisprudence, the trial judge is entitled to 'a margin of appreciation'*.
>
> 197. *Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it inthe court below*. Something more is required than personal unease and somethingless than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used — 'clearly', 'plainly', 'blatantly','palpably' wrong, is an adaptation of what Lord Fraser of Tullybelton said in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 642, 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, *I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible*. The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. (Emphasis added.)

[147] It is true that the 'margin of appreciation' doctrine, as Ward LJ was well-aware, was derived from a case which dealt with discretionary power. This doctrine, which is derived from the French term *marge d'appréciation*, is more helpfully translated as 'margin of assessment/appraisal/estimation' and refers to the room for manoeuvre. The element of 'reasonableness' features prominently in the jurisprudence discussing this doctrine. The recognition that a certain margin of appreciation is acceptable depending on the facts and circumstances of a particular case should be the only 'fixed' criterion relevant to the assessment of what constitutes a reasonable result. After all, the Supreme Court in *Carlyle* had indicated that it might have come to a different conclusion than the trial judge had it been sitting in the first instance but ultimately upheld the trial judge's decision as it had a reasonable basis.

[148] Given the aforesaid, we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the plainly wrong test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's

conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[149] Coming back to the question posed by the appellant, the said question has three limbs, namely:

(a) whether the application of the plainly wrong test by an appeal court in reversing the findings of facts by a trial court should be subject to guidelines; and

(b) whether the guidelines laid down by the UK Supreme Court in *Henderson v Foxworth Investments Ltd and Another* (2014) 1 WLR 2600 and *Mc Graddie v Mc Graddie and Another* (2013) 1 WLR 2477 should be adopted as the relevant guidelines; or

(c) such other guidelines as may be relevant or appropriate? Based on the aforesaid discussion in the preceding paragraphs of this judgment, our answers to the three limbs in the question posed are as follows:

(i) for paragraph (a), the answer is in the negative;

(ii) for paragraph (b), the answer is that the Supreme Court in *Henderson* was not setting any guidelines to the plainly wrong test but merely construed the meaning of the plainly wrong test. *Henderson* followed *Mc Graddie* in the application of the 'plainly wrong test'; and

(iii) for paragraph (c), the answer is in the negative as there is no necessity to have a rigid guideline to be adopted by an appellate court in the application of the 'plainly wrong test' in reversing finding of facts by a trial court.

Conclusion on the Appeal

[150] The Court of Appeal reversed the findings of the trial judge on facts when it held that 'there was no judicial appreciation of the evidence adduced before it'. We are of the view that the Court of Appeal had erroneously applied the plainly wrong test in a broad and general manner. The Court of Appeal erred in arriving at its conclusion without identifying specifically why the learned trial judge's findings were plainly wrong on the key issues, namely the purpose of the payment by Ng. Essentially the Court of Appeal disagreed with the learned trial judge's conclusion as to the purpose of the payment of RM6m by Ng to TEK and reversed the said conclusion premised on their disagreement. Clearly it had erred in taking the approach that it could, on an assessment of the evidence before the trial judge, reach a different conclusion on the facts from that of the learned trial judge because it disagreed with it. The Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* had decided that such approach was wrong when it held that:

> ... it was irrelevant that, with whatever degree of certainty, it (the appellate court) considered that it would have reached a different conclusion from the trial judge.

[151] It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned. The task of the trial judge is hard enough, without having to deal with every single piece of evidence which may emerge in the course of the trial. If such a requirement was to be imposed on a trial judge then their task in hearing a case would be very tedious and the time taken to produce judgments would increase. *Mc Graddie* had dealt with this point holding that versions of story goes to credibility, and if a witness is believed, the fact that there were contradictions would not displace the truth of his case. In this regard, Lord Reed said:

> [28] In a case where the court was faced with a stark choice between irreconcilable accounts, the credibility of the parties' testimony was an issue of primary importance. The Lord Ordinary found that the pursuer was a credible witness on the credible issue, notwithstanding a number aspects of the evidence which could be regarded as detracting from his credibility, including the aspects mentioned in para 26. The question whether the pursuer's evidence was to be regarded as credible and reliable having regard to the other evidence in the case was pre-eminently a matter for the Lord Ordinary.

[152] The Court of Appeal failed to undertake the appropriate review exercise and further failed to make the appropriate determination that the learned trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. Unless the conclusion that the learned trial judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed premised on the *Henderson, Mc Graddie* and *Tengku Dato' Ibrahim Petra Tengku Indra Petra* principles. The Court of Appeal failed to impeach the analysis of the evidence on the key issue of the purpose of the payment and other crucial issues which are in dispute between the parties.

[153] We had analyzed the facts and judgments of both the trial judge and the Court of Appeal and we found that the trial judge had arrived at his findings of fact based on what he heard and saw from the main plaintiffs' witness, Ng, who had direct knowledge of the payments, which he was entitled to. Compared to the evidence of the defendants' witnesses who had no personal knowledge of the payments. We cannot say that the trial judge's findings of fact or conclusion was one where no reasonable judge would make in the circumstances. The assessment of credibility of witnesses is well within the purview of the trial judge and it is not for the appellate court to interfere. The evidence as a whole can reasonably be regarded as justifying the conclusions arrived at the trial and that conclusion was heard and seen by the learned trial judge as compared to the appellate court who has not enjoyed this opportunity. In addition, there has been no findings by the Court of Appeal that the learned trial judge had gone plainly wrong and neither was there on a reconsideration of the whole evidence, the opposite conclusion should be reached.

[154] Based on the foregoing paragraphs, it is our considered view that the Court of Appeal has committed a fundamental error when it failed to impeach the learned

trial judge's analysis of the evidence on key issues, namely the purpose of the payment by Ng and other critical matters in dispute between the parties. Hence, the Court of Appeal has erred when it intervened and reversed the findings of fact of the learned trial judge and allowed the appeal of the defendants. This warrants appellate intervention on our part.

[155] Consequently, we unanimously allowed the appeal by the plaintiffs with costs of RM70,000 for here and below. The order of the Court of Appeal is hereby set aside and the order of the High Court is reinstated.

[8] In *Lim Choon Seng v Lim Poh Kwee* [2020] 5 MLJ 587 the Federal Court held as follows:

[82] The principle on which an appellate court could interfere with findings of fact by the trial court was re-emphasised by this court in reversing the decision of the Court of Appeal in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and Another* [2018] 2 MLJ 177. It is the 'plainly wrong' test, in the sense that the finding cannot reasonably be explained or justified and so is one which no reasonable judge could have reached; and that if the appellate court is not satisfied that the decision suffers from that infirmity, it is irrelevant that with whatever degree of certainty, it would have considered that it would have reached a different conclusion from that of the trial judge.

[83] Thus, the mere fact that the appellate court would have come to a different conclusion on the evidence is not a ground for interference except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the same position as the trial court. We do not think it is necessary to cite any authority for this trite proposition of law.

[84] The principle was applied with full force by this court when, in reversing and setting aside the decision of the Court of Appeal, it gave the following reasons, amongst others, for its decision:

(a) the Court of Appeal misread or misapprehended the judgment of the High Court;

(b) the Court of Appeal did not make the appropriate determination that the trial court's conclusions on primary facts were plainly wrong, bearing in mind 'appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole' (*Housen v Nikolaisen* [2002] 2 SCR 235) — the majority judgment of the Supreme Court of Canada;

(c) the Court of Appeal did not impeach the High Court judge's analysis of the evidence on pivotal issues of fact and other critical issues in dispute between the parties;

(d) the underlying basis for the Court of Appeal to justify its appellate interference was wholly misconceived and untenable, leading to a flawed finding that there was a misdirection in law and fact on the part of the High Court; and

(e) the basis on which the Court of Appeal relied on in justifying appellate intervention with the judgment of the High Court was based on flawed findings, the result of which was a severe miscarriage of justice.

[9] The abovementioned decided authorities relates to principles on appellate interference with trial judges' findings of fact. The specific principles on appellate interference with trial judges' award of damages and quantum of damages are summarised below.

[10] In an appeal against award of damages or compensation, before interference, the appellate court must be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered (see House of Lords in *Davies and another v Powell Duffryn Associated Collieries* [1942] AC 601 at pp 616–617, followed in *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288 at p 292; also Federal Court in *Rasidin Binpartorjo v Frederick Kiai* [1976] 2 MLJ 214). To constitute a wholly erroneous estimate of the damages, the amount awarded must manifestly be either excessively high or excessively low.

[11] In an appeal on quantum of damages in the form of loss of earnings where the finding of the trial judge on monthly income of the plaintiff was in direct contradiction with the plaintiff's clear admission, the appellate court held that there was misdirection of law on the part of the trial judge and therefore the appellate court reversed the finding and allowed the appeal (see *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 (SC)).

[12] The appellate court will not interfere with a trial judge's finding on quantum of damages unless there was an omission on the part of the trial judge to consider some relevant matters or he had admitted for the purpose of assessment some irrelevant considerations: Federal Court in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; followed by the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 at p 682 para 16.

[13] In this appeal, the first defendant has cited the cases of *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 at p 139, *Hussein & Anor v Maiden* [1970] 1 MLJ 114 at p 115 (right hand column) to p 116B (left hand column), *Rasidin Binpartorjo v Frederick Kiai* [1976] 2 MLJ 214 and *Mahmod bin Kailan v Goh*

Seng Choon & Anor [1976] 2 MLJ 239 which also decided to the similar effects as stated above.

[14] The principles on appellate interference that can be gleaned from the abovementioned case authorities can be summarised as follows:

(a) an appellate court should not interfere with the trial judge's findings of fact unless the trial judge has erred in principle or was plainly wrong in making such findings;

(b) when it comes to an evaluation of oral evidence, the extent to which the benefit of hearing the witnesses and watching the evidence unfold will result in the trial judge having a particular advantage over an appellate tribunal will vary from case to case. Accordingly, it is not possible to lay down any single clear general rule as to the proper approach for an appeal court to take where the appeal is against an evaluation …: per Lord Neuberger's remarks at para 60 of *Re B (a Child) (FC)* [2013] UKSC 33; cited with approval by Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at para 144);

(c) the mere fact that the appellate court would have come to a different conclusion on the evidence is not a sufficient ground for interference with factual decision except where the decision of the trial court was based entirely on inferences to be drawn from the proved facts (as opposed to findings which involved the issue of the credibility of the witnesses), in which case the appellate court would be placed in the same position as the trial court: per Abdul Rahman Sebli FCJ in *Lim Choon Seng v Lim Poh Kwee* para 83;

(d) the principle on which an appellate court could interfere with findings of fact by the trial court is the 'plainly wrong' test, in the sense that the finding cannot reasonably be explained or justified and so is one which no reasonable judge could have reached; and that if the appellate court is not satisfied that the decision suffers from that infirmity, it is irrelevant that with whatever degree of certainty, it would have considered that it would have reached a different conclusion from that of the trial judge: per Abdul Rahman Sebli FCJ in *Lim Choon Seng v Lim Poh Kwee* para 82;

(e) it is not sufficient for the appellate court to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court. Although there may be inconsistencies in the evidence which could mean that another

judge would have been persuaded to reach a different conclusion, this is not relevant when considering if a trial judge's findings of fact could be overturned: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 para 151;

(f) to justify interference with the trial judge's findings of fact, the appellate court has to make the appropriate determination that the trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. Unless the conclusion that the trial judge drew from it was one that no reasonable judge would have made, his conclusion on the point should be left undisturbed: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 para 152;

(g) rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the plainly wrong test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 para 148;

(h) apart from the above examples and general statements of principles, the application of the plainly wrong test by an appeal court in reversing the findings of facts by a trial court should not be subject to any fixed or rigid guidelines: per Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 para 148;

(i) generally, there is reluctance on the part of the appellate court to disturb the trial court's assessment of liability apportionment in road accident cases unless the appellate court is satisfied that it must be wrong: Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and Other Appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585;

(j) in an appeal against award of damages or compensation, the appellate court may intervene where it is satisfied that the trial judge has acted on

a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered: House of Lords in *Davies and another v Powell Duffryn Associated Collieries* [1942] AC 601 pp 616–617, followed in *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288 at p 292; or to be a wholly wrong estimate of the damages, the amount awarded must manifestly be either excessively high or excessively low; and

(k) an omission on the part of the trial judge to consider some relevant matters or he had admitted for the purpose of assessment some irrelevant considerations or a misdirection of law are examples of having acted on a wrong principle of law or having misapprehended the facts which justifies appellate interference on the award of damages or the quantum of damages: Federal Court in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; followed by the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 at p 682 para 16.

LIABILITY ISSUES

[15] In our present case, the learned sessions court judge held on liability that the first defendant was 80% liable, the plaintiff 20% contributory negligence and the second and third defendants not liable at all.

[16] The learned sessions court judge's decision on liability is in essence a factual decision based on her findings of fact and after having heard the oral evidence of witnesses (including two independent witnesses) and after having the advantage of observing the demeanour of the witnesses.

[17] In paras 2–6, 9–10 and 16–85 of his grounds of judgment, the learned sessions court judge has analysed in detail the evidence of the witnesses and also the documentary evidence before coming to the factual conclusion that the first defendant was 80% liable for the accident, the plaintiff was responsible 20% for contributory negligence and the second and third defendants were not liable at all for the accident.

[18] Having perused the evidence, this court came to the conclusion that:

(a) the learned trial judge's findings of fact are supported by the evidence of an independent witness, SP1 Noh bin Mohd Ibrahim, the investigating officer who investigated the accident;

(b) the learned trial judge's factual decision is also consistent with the silent evidence in the documents tendered as evidence in the trial;

(c) there are reasonable explanations and justifications for the learned trial judge's factual decision on liability; and

(d) the learned trial judge's factual decision is a decision which a reasonable trial judge would have made.

[19] In the circumstances, this case fell below the 'plainly wrong' test for an appellate interference with the trial judge's findings of fact and the trial judge's factual decision on liability and his decision on apportionment of liability.

[20] In the premises, based on the legal principles stated in paras 4–14 above, this court has held that there was no valid or sufficient basis for this court sitting on appeal to disturb or interfere with the learned trial judge's decision on liability or his decision on apportionment of liability.

[21] Accordingly, this court on 30 November 2020 dismissed the plaintiff's appeal on liability issues.

QUANTUM ISSUES

[22] In the sessions court, the learned trial judge decided that on 100% liability basis the quantum of damages was a total amount of RM493,988.40, being comprised of RM348,500 as general damages and RM145,488.40 as special damages.

[23] On quantum issues, the plaintiff has appealed against the sessions court's quantum of awards on the following items of damages:

(a) general damages for personal injuries;

(b) special damages;

(c) cost of a maid;

(d) cost of buying a 'Vellfire';

(e) loss of earnings and allowance;

(f) loss of earning capacity;

(g) cost of renovation of the plaintiff's house;

(h) the plaintiff's pretrial and post-trial expenses as a result of the accident;

(i) interest on special damages; and

(j) costs.

[24] After hearing the parties, this court dismissed the plaintiff's appeal on liability but allowed part of the plaintiff's appeal on quantum, and this court increased the total amount of damages on 80% liability basis by a further RM226,560 on account of two items, namely costs of domestic help and loss of earnings.

[25] Dissatisfied with the amount of increase in quantum, the plaintiff has further appealed against this court's decision on liability and quantum. In the notice of appeal filed in the appeal to the Court of Appeal, the plaintiff has listed 14 items of quantum in respect of which the appeal is made against this court's decision. The summation of the plaintiff's appeal to the Court of Appeal is that whatever quantum items which were the subject matters of appeal against the sessions court but which were not allowed fully by this court are now the subject matters of appeal to the Court of Appeal.

[26] For ease of reference, the principles upon which an appellate court will interfere with the trial judge's award of quantum of damages are summarised below:

(a) in an appeal against award of damages or compensation, the appellate court may intervene where it is satisfied that the trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damages suffered: House of Lords in *Davies and another v Powell Duffryn Associated Collieries* [1942] AC 601 pp 616–617, followed in *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288 at p 292; or to be a wholly wrong estimate of the damages, the amount awarded must manifestly be either excessively high or excessively low; and

(b) an omission on the part of the trial judge to consider some relevant matters or he had admitted for the purpose of assessment some irrelevant considerations or a misdirection of law are examples of having acted on a wrong principle of law or having misapprehended the facts which justifies appellate interference on the award of damages or the quantum of damages: Federal Court in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; followed by the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 at p 682 para 16.

GENERAL DAMAGES

[27] The details of the injuries sustained by the plaintiff have been summarized by the learned trial judge in para 89 of his grounds of judgment. The principles on damages referred to by the learned trial judge can be found in paras 86–87 of this grounds of judgment, and this court does not find any

error in such principles. In paras 96–114 of his grounds of judgment, the learned trial judge adequately considered and dealt with the heads of personal injuries item by items before awarding the quantum for them. This court does not find any error in principle on the part of the learned trial judge in his assessment of the quantum of damages except for two items, namely, costs of domestic help and loss of earnings.

The award for fracture dislocation thoracic vertebra t3 and t4 with neurological deficit and paraplegia

[28] In the sessions court, counsel for the plaintiff submitted a sum of RM300,000 and counsel for the defendants submitted RM200,000. The range of awards for such an injury at p 18 of the *Revised Compendium* is between RM220,000–RM300,000. In the circumstances, the trial judge's award of RM250,000 is clearly not manifestly low. The plaintiff has not established any appealable error to justify this court's interference with the quantum of this item of damages.

The award for the closed comminuted fracture of the distal end of the left radius

[29] In the sessions court, counsel for the plaintiff submitted a sum of RM30,000 for this injury, but relied on a case when a sum of RM25,000 was awarded for a fracture of the left radius and the distal radius ulna joint (ie a fracture of the radius and ulna). The range of awards for a fracture of a radius in p 9 of the *Compendium* is between RM12,000–RM30,000. In the circumstances, the learned trial judge's award of RM20,000 is reasonable, bearing in mind the range in the *Compendium* and the awards in the cases of *Safarizuan bin Mustafa v Leizaini bt Abd Gani* [2018] 2 PIR 52 at para 42, p 481 and *Roshidan bin Shamsudin (suing by himself and as administrator of the estate of Muhammad Aiman Izzan bin Roshidan, deceased) v Muhammad Saimee bin Che Isa & Anor and another appeal* [2019] 7 MLJ 800 at p 815. In this court's view, the learned trial judge's quantum for this item of injury is not manifestly low. The plaintiff has not established any appealable error to justify this court's interference with the quantum of this item of damages.

The award for the closed bilateral fractures of the pubic rami

[30] In the sessions court, the plaintiff's counsel submitted a sum of RM70,000 but relied on a case where the plaintiff also sustained multiple hip fractures. The learned trial judge's award of RM50,000 for bilateral fractures of the pubic rami is reasonable, bearing in mind the range of awards in p 13 of the *Compendium*.

The award for the puncture wound over the left shoulder

[31] The learned trial judge's award of RM2,500 was the sum suggested by the plaintiff's counsel.

The award for bilateral lung contusion with right pneumothorax and a fracture of the right fourth rib

[32] In the case authority submitted by counsel for the plaintiff, namely *Lee Chee Kwong v Kutiandy Thanniamalay & Anor* [2016] 5 LNS 6; [2016] MLRSU 10, the plaintiff there sustained a bilateral pneumothorax and a lung contusion and fractures of five ribs. On the other hand, the injuries sustained by the plaintiffs in the decided cases referred to by counsel for the defendants (see *Wong Fui Chien & 2 Ors v Chin Wen Cheng & Anor* [2019] 2 PIR 31) and by the learned trial judge (*Wan Anas Hamizan bin Wan Adnan & Anor v Mohd Zamri bin Sa'ari & Anor* [2019] 1 PIR 30) are similar to the injuries sustained by the plaintiff in this case. In the circumstances, the learned trial judge's award for bilateral lung contusion and pneumothorax (RM12,000) and for fracture of one rib (RM4,000) are reasonable.

The award for scars

[33] In the sessions court, counsel for the plaintiff submitted a sum of RM12,000, and the learned trial judge awarded a sum of RM5,000, based on the award of a similar sum for the scars in the case of *Mohd Nizatul Azmi bin Mahamad Radzi & Anor v Rusmah bt Ahmad & Anor* [2019] 1 PIR 17. The plaintiff in our present case has two scars, over the upper thoracic region and left wrist (see p 480, at Vol 2.3 of the record of appeal). Bearing in mind that the scars are the residual effects of the injuries which have been compensated under those injuries of the male plaintiff and the scars are not on the face or neck of the plaintiff, this court finds that the learned trial judge's quantum of damages for scars is not manifestly low. In the circumstances, the learned trial judge's award of RM5,000 for scars should not be disturbed.

The award for muscle wasting

[34] In the present case, the plaintiff has only slight muscle wasting of his left arm and forearm (see p 481 at Vol 2.3 of the record of appeal). Bearing in mind that the *Compendium's* recommendation for this type of injury is between RM3,000–RM5,000, the learned trial judge's award of RM5,000 is clearly reasonable and should not be disturbed.

SPECIAL DAMAGES

[35] The learned trial judge has correctly pointed out in his grounds of judgment that special damages must be specifically proved (see paras 119 and 167–168 of his grounds of judgment).

[36] Counsel for the first defendant has referred to the case of *Sum Kum v Devaki Nair & Anor* [1964] 1 MLJ 74 where the Federal Court stated as follows:

> *In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars, and throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me this damages'. He has to prove it.*
>
> This is also the legal principle on special damages which our appellate courts have repeatedly restated in various subsequent cases including *Popular Industries Ltd v The Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635 at p 648 (FC) and *QED Systems Sdn Bhd v Global Minerals (Sarawak) Sdn Bhd* [2020] MLJU 940 (CA).

[37] In this case, all the documents pertaining to proof of special damages were placed in Part B of the agreed bundle (formal proof dispersed with but the maker required to give evidence and to be cross-examined (see line 1–5 at p 245, Vol 2.1 of the record of appeal).

[38] Apart from giving his own oral evidence, the plaintiff only called his son (SP2) and his wife (SP3) as witnesses in respect of quantum of damages.

[39] In the present case there are 167 items of special damages claimed by the plaintiff, of which a majority of the items are small amounts of alleged out-of-pocket expenses. After having heard the witnesses and considered the parties' respective submissions, the learned trial judge in his grounds of judgments has dealt specifically with the plaintiff's claims for 167 items of special damages and then summarized his awards on special damages in a table. Having perused the appeal records and having considered the parties' respective submissions in this appeal this court has come to the conclusion that only two items of the learned trial judge's awards on special damages justify an appellate interference, and there is no sufficient ground or basis for interference with the other items of the awards on special damages. The two items of awards on special damages which this court decided as justifying an increase in amount are the costs of maid/domestic help and the loss of earnings. Elaborations and explanations of this court's decisions on quantum of special damages are set out in the paragraphs below.

Cost of a maid/nursing care

[40] In his statement of claim (see item 13 at p 49 of Vol 1 of the record of appeal) the plaintiff has made the following claim:

> 13 Kos mengupah pembantu rumah sebanyak RM1,200 sebulan dari tarikh kemalangan dan masih berterusan ... RM349,200

[41] At para 8 of his memorandum of appeal (p 8 of Vol 1 of the record of appeal), the plaintiff has claimed that the learned trial judge erred in law and fact by not allowing the claim for cost of a maid or nursing care.

[42] In his witness statement, the plaintiff has claimed that he required a maid and has alleged that a sum of RM1,200 per month was required for the maid or a sum of RM4,600 per month for a trained nurse (see his answers to questions 49–52 at p 104 of Vol 2.1 of the record of appeal).

[43] When cross-examined on this claim (see the answers to question 113 of Vol 2.1 of the record of appeal), the plaintiff admitted that there was no document to specifically state that he required a maid or a trained nurse apart from his choice of orthopaedic specialist's opinion that *he required 'assistance'* (for activities for daily living) — see Dr Chee's report, p 448 of Vol 2.3 of the record of appeal.

[44] The plaintiff was also referred to the orthopaedic report prepared by Dr Yeoh Poh Hong, the specialist of choice of the second and third defendants. Dr Yeoh has stated that the plaintiff:

> ... does not require any assistance for his activity of daily living (see p 477, Vol 2.3 of the record of appeal)

[45] In addition to Dr Yeoh's opinion, Dr Vivek Ajit Singh, the first defendant's choice of orthopaedic specialist, has noted as follows (see p 483, Vol 2.3 of the record of appeal):

> d. Daily living assessment:

Activity	Remarks
Bed-chair/wheelchair transfer	Able to transfer by himself. He is wheelchair independent.
Grooming	Able to do himself
Feeding	Able to do himself
Bathing	Able to do himself
Dressing	Able to do himself
Driving	Able to do himself — modified car

[46] Dr Vivek's opinion was that the plaintiff '... is able to live independently as he is able to transfer or get about. He is able to carry out his daily basic chores such as dressing himself *with assistance*' (see p 484, Vol 2.3 of the record of appeal). A

[47] The plaintiff's choice of rehabilitation specialist, Dr Saini Jeffery Freddy Abdullah also confirmed that the plaintiff ' ... is a spinal cord injured patient who is independent' (see p 452, Vol 2.3 of the record of appeal) and that ' ... the patient is currently staying at home and is independent in all activities of daily living.' (see p 453, Vol 2.3 of the record of appeal). The defendant's choice of rehabilitation specialist, Dr Lydia Abdul Latif confirmed his opinion (see p 488, Vol 2.3 of the record of appeal). B C

[48] In her evidence, the plaintiff's wife (SP3) also claimed for that a maid was required, but also admitted that she was able to take care of the plaintiff (see pp 91 and 92, Vol 2.1 of the record of appeal). D

[49] The plaintiff's son (SP2) did not make any claim or allegation that the plaintiff required a maid.

[50] In the sessions court, the learned trial judge concluded that the plaintiff did not require the services of a maid (see para 143 of the grounds of judgment) and that the necessity for and costs of maid or domestic help has not been specifically proved, and therefore the learned trial judge dismissed in toto the plaintiff's claim for costs of maid or domestic help. E F

[51] It is settled law that the court of law is not bound by the expert witnesses' opinion evidence although such opinion evidence is admissible as relevant evidence for consideration by the court. On very specialized or highly technical fields of science including medicine, the court of law tends to place more reliance upon the relevant experts' opinions in those fields of science rather than the court forming its own view or opinion independently of them. However, at times when the experts extend their opinion evidence which come within the province of common experience, common sense and logic in life which the court of law can form its views and opinions from its own knowledge and experience in life and in the practice of law, the court may not give much weight to an expert's opinion which is inconsistent with or is not supported by common experience, common sense and logic in life. Experts have their own skills and expertise in their respective fields of science and practice but no person (including the experts) can claim exclusive expertise and knowledge in common experience, common sense and logic in life. G H I

[52] The question of whether or not an injured person with the permanent defects or disability need the assistance, and if so the extent of such assistance,

of another person in order to carry on with his activities in life is ultimately a question to be decided according to common experience, common sense and logic in life, though the experts' opinions can be considered in the process of such decision-making. From the perspective of common experience, common sense and logic in life the crux of the question concerning this plaintiff of age 47 who sustained spinal cord T3 and T4 fracture with neurological deficit causing complete paraplegia and with residual loss of functions of bladder, bowel and sexual function is whether or not he can in the balance of his life live his own life 100% independently and without any assistance of another person (be it a maid or his next-of-kin akin to a domestic help). If the answer is yes, then the learned trial judge would be correct in his conclusion made by inference from the facts and evidence; if the answer is no, then the learned trial judge's conclusion made by inference from the facts and evidence would be erroneous. By applying common experience, common sense and logic in life to this simple core question, this court is of the considered view and conclusion that the answer is 'no', and that the reasonable conclusion to be drawn by inference from the facts and evidence in the present case is that the plaintiff here can do a majority of his daily activities on his own but he needs assistance for some of his daily activities in life. It is a case of neither 100% independence nor 0% independence; it is a case of substantial independence but partial dependence for doing his daily activities in life. As decided by the Federal Court in *Lim Choon Seng v Lim Poh Kwee* para 83 (per Abdul Rahman Sebli FCJ), an appellate court is in as good a position as the trial judge to make inferences from facts and evidence, and therefore, this item justifies an appellate interference.

[53] In addition, the learned trial judge also erred in principle in failing to appreciate that when it comes to costs of domestic help there is no necessity for specific proof of actual expenses: see Privy Council's decision in *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217; [1984] 1 MLRA 27; followed by the court in *Satishwaran a/l Selvaraju (suing through his personal representative M Amudavali a/p S Muthiayah) v Alsone bin Aripin and another appeal* [2018] MLJU 655; [2018] MLRHU 1. This principle was explained by our Court of Appeal in the case of *Tan Ah Kau v The Government of Malaysia* [1995] MLJU 183; [1995] 1 MLRH 497 where the court allowed RM350 per month as cost of nursing care without specific proof of cost. Family members' care is also recognized and included as cost of domestic help (see *Syarizan bin Sudirmin (a child claimed through the father and his attorney Sudirmin bin Selamat) & Ors v Abdul Rahman bin Bukit & Anor* [2010] 8 MLJ 530; [2009] 3 MLRH; *Jamil Harun*). It is consonant with common sense and common experience in life that a family members' care is of better quality and higher standard than those of an external maid or domestic help; the practical applications of our legal principles to facts do not flout common sense and common experience in life to the extent of giving nil monetary value of compensation to a family member's care of better quality and higher standard

in one breathe and giving full monetary value of compensation to the cost of external maid or domestic help's service in the other breathe. In the premises, the learned trial judge erred in principle in his outright dismissal of the claim for cost of domestic help and an appellate interference is justified in the circumstances of the present case.

[54] The plaintiff did not claim for cost of nursing care as such in their statement of claim and therefore the learned trial judge was correct in rejecting the plaintiff's solicitors' submissions for such an award (see para 142 of his grounds of judgment). As such, the plaintiff is not allowed to pursue any claim for nursing care. What the plaintiff can pursue is a claim for maid or domestic help.

[55] This court accepts the plaintiff's evidence that the reasonable amount of basic salary of a full-time maid or domestic help is RM1,200 per month. From the experts' evidence and opinions and as concluded by this court, the plaintiff needs partial but not total assistance for doing his activities in life. Taking all factors into account, this court concludes that an amount of RM600 per month is a reasonable amount for the cost of domestic help on partial basis for the plaintiff. Taking into account the contingencies and vicissitudes of life and the accelerated payment (hence one-third reduction) and 90% of the normal life expectancy (90% of 73 years = 66 years), this court assesses the total amount of the plaintiff's costs of domestic help for the balance years of his life as:

RM600 per month x 2 months per year x (66–47) years x 2/3 = RM91,200.

This court's reasons for the one-third deduction are as stated in paras 56 and 57 below.

[56] Unlike the statutory multiplier formula of [(55–47)/2] for the loss of earnings which by such statutory formula has discounted the multiplier for the balance life of the plaintiff by deducting contingencies, vicissitudes of life and accelerated payment for loss of future earnings, a straight-line multiplication of the future costs of helping maid for the plaintiff's balance years (which is not circumscribed by any statutory formula and is therefore not capped up to age 55) of 73 x (90%–47) = 19 has not taken into account any deduction for contingencies, vicissitudes of life or accelerated payment. Costs of future supervisory care is not regulated by the statutory provisions of the Civil Law Act and accordingly such costs of future care ought to be assessed and computed in accordance with the common law principles.

[57] In *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 (Supreme Court) and *Takong Tabari v Government of Sarawak & Ors and Another Appeal* [1998] 4 MLJ 512 (Court of Appeal), it was held that the common law practice

of making deductions for contingencies, vicissitudes of life and accelerated payment continues to be in force as the parliament has not expressed its intention to depart from the general system of law. As the costs of future supervisory care is not regulated by the statutory multiplier formula, the one-third deduction for contingencies, vicissitudes of life and accelerated payments should apply to the calculation of the costs of future supervisory care which in turn is not limited by the statutory cap of 55 years of age for the loss of earnings.

Cost of buying a Toyota Vellfire

[58] The plaintiff has claimed for the cost of this vehicle in his witness statement (questions 62–64 at p 106, Vol 2.1 of the record of appeal), but no other evidence or witness was produced to prove the need for or the cost of such a vehicle.

[59] On the contrary, the plaintiff informed Dr Yeoh Poh Hong that he was driving a specifically modified vehicle and was able to drive himself to his physiotherapy sessions (p 472, Vol 2.3 of the record of appeal), and he informed Dr Lydia that he was able to drive a modified car and had his own car that was approved by PUSPAKOM (see p 448, Vol 2.3 of the record of appeal).

[60] Bearing in mind the lack of evidence for the need for and also the cost of a 'Vellfire', the learned trial judge was entirely correct in dismissing this claim (see paras 161–163 of his grounds of judgment).

[61] Lest another litigant would fall into a tactical error of claiming for a Toyota Vellfire or another motor vehicle of luxurious category as the alleged cost of transportation vehicle for his/her wheelchair-bound activities in life, this court would like to make some additional observations regarding any claim of such nature.

[62] A plaintiff who claims for the alleged cost of a transportation vehicle for his/her wheelchair-bound activities in life has to prove the following requirements conjunctively:

(a) the necessity of the use of a transportation vehicle for at least a significant part of his/her daily activities;

(b) the need to buy another or separate transportation vehicle is caused by the accident or tortious act of the defendant;

(c) the type and model of the transportation vehicle which is reasonably necessary for sustaining his/her wheelchair-bound activities in life; and

(d) the costs of such reasonable type and model of the transportation vehicle.

After the abovementioned requirements have been proved on a balance of probabilities, the net amount to be awarded for such costs of transportation vehicle has to be assessed by also taking into account the value of improvement or unjust enrichment to be deducted from the total gross amount. Arising from the principle of equivalence in compensatory damages, it is logical and reasonable that a plaintiff who, if not for the road accident or tort would not be able to afford a motor vehicle other than a motorbike in his lifetime, should not be entitled to recover the full monetary value of the total gross costs of a reasonable transportation vehicle which is only necessary for part of his daily activities and in respect of which the plaintiff and his other family members have also enjoyed something over and beyond their original pre-accident lifestyle. The question of the degree or extent of deduction to be made on such account of improvement or unjust enrichment would depend on the facts and circumstances of each particular case. The abovementioned deduction is also consistent with the general principles of damages that a plaintiff has to take reasonable steps to mitigate his losses and damages.

[63] Coming back to the facts and evidence in our present case. The evidence in our present case shows that plaintiff has modified his pre-existing motor vehicle to suit his post-accident life and he has been able move about in this modified motor vehicle. Upon the learned trial judge's factual finding that the plaintiff has not proved the necessity of another or separate transportation vehicle, the plaintiff's claim for a transport vehicle should be dismissed. This court does not find any basis for saying that the learned trial judge was in way wrong, not to mention plainly wrong, in making such factual finding. As such, on this ground alone, the plaintiff's appeal on this item of claim should be dismissed.

[64] As regards the second requirement for this claim, this court finds that the plaintiff has failed to prove the need to buy another or separate transportation vehicle is caused by the accident or tortious act of the defendant. From the evidence adduced, the plaintiff has been able to use his existing modified motor vehicle for his transportation needs. In such situation, the plaintiff's plausible claim would be limited to the modification costs and incidental expenses of existing motor vehicle, but his failure to plead or prove the modification costs has disentitled him from recovering such costs in this case.

[65] Further or alternatively, this court also finds that the plaintiff has failed to prove that a Toyota Vellfire is the type and model of the transportation vehicle which is reasonably necessary for sustaining his/her wheelchair-bound activities in life. A litigant should take cognizance of the reality and common

fact of life that only a small segment of our society can afford the luxury of a Toyota Vellfire, and that there are a number of other types and models of relatively much cheaper motor vehicles which are available for use as modified motor vehicles to be used by wheelchair-bound persons. Such other types and models of relatively much cheaper motor vehicles include vans of various models (including Toyota Hiace, Nissan Econovan and other equivalent models which are commonly used as ambulances, transport for small groups of tourists or workers; Hyundai Starex and Kia Carnival commonly used by corporations for transporting their officers and staff or by families for their family transportation etc), sedan cars of various models (commonly used by wheelchair-bound drivers with 'OKU' logo) or SUVs such as Nissan X-Trail, Honda CTV, Honda BRV etc. Even if the other requirements for proof of entitlement have been established, a litigant who claims for cost of a Toyota Vellfire has to prove, in accordance with the principles on damages, that it is reasonable for him/her to be awarded the much higher cost of a Toyota Vellfire instead of the much lower cost of another type or model of motor vehicle.

[66] On several grounds as stated above, the learned trial judge was correct and/or justified in dismissing the plaintiff's claim for the cost of a Toyota Vellfire. This court finds no basis or justification for interfering with the learned trial judge's dismissal of the plaintiff's claim on this item.

Loss of earnings/allowance:

[67] The plaintiff in the present case was 47 years old at the time of the accident. Any claim for loss of earnings would, according to the express provisions in the Civil Law Act, therefore be for a period of four years only [(55-47)/2].

[68] In the sessions court, the learned trial judge held that the plaintiff had failed to prove his claim for loss of earnings as his alleged employer was not called as a witness. The learned trial judge also stressed the need for such claims to be strictly proved in law and relied on the High Court cases of *Muhammad Hanif bin Ishak (a patient and this action is brought by his father, litigation representative, Ishak bin Hashim) v Mohammad Syazwan bin Mohamad Fuad & Anor* [2017] 9 MLJ 431; [2017] 1 LNS 372 (see para 20 of his grounds of judgment) and *Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock* [2016] MLJU 880; [2017] 4 MLRH 370; [2016] 2 PIR 56 (see para 22 at p 539). By the said decision, the learned trial judge seems to act on the proposition that a claimant's employer must invariably be called as a witness to testify in the court in order to prove the loss of the claimant's earnings on a balance of probabilities.

[69] With due respect to the learned trial judge, there is no principle of law to the effect that a claimant's employer must invariably be called as a witness to

testify in the court in order to prove the loss of the claimant's earnings on a balance of probabilities. Although the law requires special damages to be specifically proved, there is no law to require that such specific proof can only be established by the claimant's employer and nobody else or nothing else. Although a claimant's employer may in some cases be relevant or material witness in proving the earnings of the claimant, the specific proof of the claimant's earnings can also be established on a balance of probabilities by many other forms of proof or by evidence of other witnesses. To cite but several obvious examples, documentary proof in the form of employee fund statements, income tax returns, salary slips and/or bank statements can constitute sufficient specific proof of the claimant's earnings. In this judgment, I have deliberately avoid the word 'strictly' in the context of proof of special damages because the word 'strictly' can convey different meanings to different persons so much so that at time it leads a counsel to an unsustainable and ludicrous argument that if a claimant pleads 'X' amount of special damages but proves only 'Y' amount of special damages then the claimant's claim for special damages must be dismissed in toto. In my understanding of the law, as a general principle the special damages have to be proved specifically; however, in the event that if a claimant pleads 'X' amount of special damages but proves only 'Y' amount of special damages then the claimant's claim for special damages should be allowed in whatever is the lower figure of 'X' or 'Y'. Where the pleaded amount is less than the specifically proved amount, the claimant is to be awarded the pleaded amount (which is the lower of the two amounts) by reason of the principle that he is bound by his own pleadings. Where the pleaded amount is higher than the specifically proved amount, then the claimant is to be awarded the specifically proved amount (the lower of the two amounts) by reason of the principle that he cannot recover more than what he has specifically proved in evidence. This has been the settled principle and practice followed by the courts in innumerable cases in Malaysia as well as in other common law countries. This court's deliberate avoidance of use of the word 'strictly' in the context of proof of special damages is intended to avoid any misunderstanding or misinterpretation of the meaning of the word 'strictly', bearing in mind the abovementioned principle and settled practice on award of special damages.

[70] In *Renhome Bricks Factory Sdn Bhd v Watah Umpin* [2009] 9 CLJ 494; [2008] 4 MLRH 430 it was held that no formal proof such as income tax returns, EPH statement or SOCSO documents is necessary for loss of earnings. Oral evidence may be relied upon to prove the amount of earnings in some cases: *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 MLJ 182; [1995] 2 MLRH 795. In this connection, this court agrees with the plaintiff's submission that the cases of *Muhammad Hanif bin Ishak (a patient and this action is brought by his father, litigation representative, Ishak bin Hashim) v Mohammad Syazwan bin Mohamad Fuad & Anor* [2017] 9 MLJ 431; [2017] 1 LNS 372 and *Kalaivanan a/l Sundarajoo & Anor v Poo Cheng*

Hock [2016] MLJU 880; [2017] 4 MLRH 370; [2016] 2 PIR 56 can be distinguished on the facts. In any event, this court does not find that the cases of *Muhammad Hanif bin Ishak (a patient and this action is brought by his father, litigation representative, Ishak bin Hashim) v Mohammad Syazwan bin Mohamad Fuad & Anor* [2017] 9 MLJ 431; [2017] 1 LNS 372 and *Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock* [2016] MLJU 880; [2017] 4 MLRH 370; [2016] 2 PIR 56 can be interpreted as attempting to lay down any principle of general application to the effect that the earnings of a claimant can only be proved by his employer and no other person or form of proof, or that the proof of earnings must only be by documentary evidence. Although in cases where it is usually expected that the amount of a person's earnings is well-documented in various forms of documentary evidence the court in pursuance of common sense would reasonably require the production of at least or more forms of such documentary evidence to be adduced as specific proof of the earnings, this common sense requirement must not be stretched to cases where the wage-earners do not have proper records or well-documented records of his earnings. To quote several such examples of wage-earners — foreign workers who work in vegetable farms and are paid in cash by farmers who do not keep documentary records, taxi drivers who collect cash from passengers but do not have surplus income as savings in bank, food-delivery motorcyclists who are paid cash and do not have surplus income as saving etc. The law cannot demand the impossible from any of these wage-earners by invariably requiring them to prove their loss of income in court by documentary evidence after he/she has sustained total disability and loss of earning as a result of a traffic accident.

[71] In our present case, the plaintiff produced the following documents regarding his employment and earnings:

(a) letter of appointment dated 13 January 2010 issued by R&A Telecommunication Sdn Bhd and accepted by him as the contract of employment between them whereby his basic salary was stated as RM4,000 per month: pp 551–554 of the appeal records;

(b) R&A Telecommunication Sdn Bhd's letter of confirmation dated 17 October 2010 which stated that his basic salary was RM4,000 per month and travelling allowance was RM500 per month: p 524;

(c) R&A Telecommunication Sdn Bhd's letter dated 21 June 2012 stating that he has been promoted to project manager: p 558 of the appeal records;

(d) R&A Telecommunication Sdn Bhd's letter dated 13 June 2012 which stated that his remunerations were basic salary of RM4,000 per month and a project allowance of RM500 per month: p 524;

(e) his payslip for the month of March 2013 showing his basic salary as RM4,000, EPF deduction as RM440 and fixed travelling allowance as RM500: p 525 of the appeal records;

(f) R&A Telecommunication Sdn Bhd's letter dated 15 May 2013 which stated that the plaintiff's employment as project manager was frustrated and therefore terminated after the plaintiff's prolonged inability to return to his job: p 523 of the appeal records;

(g) his payslip dated 31 May 2013 showing RM10,000 plus RM1,250 were paid to him as that two months of salaries and allowance in lieu as a result of frustration and termination of the contract of employment.

[72] In his oral evidence in the sessions court, the plaintiff also testified that he worked as a project manager in R&A Telecommunication Sdn Bhd pursuant to his contract of employment dated 13 January 2010, his basic salary immediately before the date of accident was RM4,000 per month plus a fixed travelling allowance of RM500 per month, and that as a result of the serious injuries with permanent disability, he could not return to the job and his employment was terminated.

[73] It is probably due to the disproportionate attention given to the numerous small items of special damages that the plaintiff has overlooked the importance of the formal requirements of proving the documents itemized in para 71 above. Despite the lack of such formal proof of the documents, this court finds that at least the contract of employment dated 13 January 2010 was sufficiently proved on a balance of probabilities because the plaintiff, being the other contracting party, can be considered as a maker or co-maker of the document evidencing the contract of employment. The basic salary of RM4,000 per month was expressly stated in the contract of employment. Even if this court were to assume that the contract of employment was not sufficiently proved, the said documents would be considered as hearsay as to the correctness of the contents but not hearsay as to the fact that these documents were issued. In that event, the plaintiff's oral evidence that he was a project manager with R&A Telecommunication Sdn Bhd with a basic salary of RM4,000 was also sufficiently proved on a balance of probabilities having regard to the rather low salary of only RM4,000 per month for a 47-year old project manager in the construction industry at a time when a fresh graduate's starting remuneration in the public service, a fact which the court can take judicial notice, was about RM3,000.

[74] In the circumstances, this court holds and concludes that the learned trial judge erred in principle and/or was plainly wrong when he dismissed the plaintiff's claim for loss of earnings.

[75] Using the statutory multiplier of four years as submitted by the first defendant, this court has assessed the total amount of the plaintiff's loss of earnings at RM4,000 x 12 x 4 = RM192,000.

Loss of earning capacity

[76] Although the plaintiff has raised this issue in para 12 of his memorandum of appeal (at p 9 of Vol 1 of the record of appeal), counsel for the plaintiff did not submit/make any claim for loss of earning capacity in their written submission or in their reply to the defendant's submission (see pp 562–632 and 669–674, Vol 2.4 of the record of appeal).

[77] In the circumstances, this court agrees with the first defendant's submission that it is now not open to the plaintiff to include this claim as one of the grounds of appeal, as it is deemed to have been abandoned.

[78] Furthermore, as the plaintiff has been awarded the loss of earnings for the balance of his useful working life as from the date of accident in accordance with the statutory provisions under the Civil Law Act, any claim for loss of earning capacity would be a duplication of the award for the loss of earnings.

Cost of renovation of the plaintiff's house

[79] In the sessions court, the plaintiff referred to the alleged cost of previous and future renovations in his witness statement (see p 105, Vol 2.1 of the record of appeal), but again failed to call any witnesses to prove this claim. The plaintiff did not explain specifically what the nature and extent of renovation, which part or items of the house were renovated or modified, or why the need for such renovation.

[80] In the sessions court, the learned trial judge made a factual decision that the plaintiff had failed to prove his case, as no quotation or evidence from any renovation contractor had been produced (see para 144 of the grounds of judgment).

[81] In the circumstances, this court finds that the learned trial judge has not erred in principle and has not acted plainly wrong in dismissing this claim for lack of proof (see para 144 of his grounds of judgment).

The plaintiff's pretrial and post-trial expenses as a result of the accident

[82] Introduction:

(a) in this appeal, the plaintiff's solicitors have merely briefly contended that the learned trial judge erred in law and in fact by not allowing the costs/expenses incurred by the plaintiff for the pretrial and post-trial

periods, without specifying which items of such other special damages they are disputing (see paras 14–15 of the memorandum of appeal at p 9, Vol 1 of the record of appeal); and

(b) specific elaboration of the various items of claims for special damages in the form of pretrial and post-trial expenses are dealt with in the following paragraphs.

The claims for cost of mattress, wheelchair, payment receipts and cost of treatment at Hospital Sungai Buloh

[83] Counsel for the plaintiff has submitted that these items should all be allowed as the documents/receipts were allegedly all in Part A of the common bundle of documents (see pp 47–54 and 62–70).

[84] The first defendant has submitted that at the full trial the counsel for the plaintiff in the sessions court closed the plaintiff's case immediately after the learned trial judge ruled that the documents be put into Part B and did not apply to call further witnesses. The relevant portion of the notes of evidence can be found at pp 243–245 of the record of appeal).

[85] It is within the discretionary powers of the trial judge, upon an application of a party to categorize the documents which were mistakenly or inadvertently included in the Part A bundle previously, as Part B documents in the full trial. Any party who is likely to be adversely affected by such exercise of discretion should apply for time and liberty to call such additional witnesses as may be necessary or expedient to prove the contents of the Part B documents consequent upon the procedural ruling of the trial judge. In our present case, the plaintiff did not apply for such time or liberty. In the circumstances, it is too late for the plaintiff to complain about the procedural ruling on appeal. Moreover, in the circumstances of the present appeal, this court does not find that the learned trial judge has erred in principle or was plainly wrong in making his procedural decision on the facts of the case. In the premises, this court finds no sufficient basis for an appellate interference with the learned trial judge's exercise of discretion in ordering the documents in question to be Part B documents.

[86] In the plaintiff's notice of appeal, the plaintiff has not specifically challenged the learned trial judge's factual decision on categorization of documents as Part B documents.

[87] In the circumstances of this appeal, this court finds no sufficient basis for an appellate interference with the learned trial judge's factual decision to dismiss the plaintiff's claims for these items of special damages.

Future cost of care at KPJ Tawakal Health Centre

[88] In the sessions court, the learned trial judge dismissed this claim for lack of proof (see paras 136–138 of the grounds of judgment).

[89] In this appeal, the first defendant has submitted that there is no evidence that the plaintiff would require such care. On the contrary, the evidence of the plaintiff's choice of rehabilitation specialist was as follows (see p 453 of the record of appeal):

> The patient is currently staying at home and is independent in all activities of daily living. However should he need nursing care and admission to a nursing centre due to illness or increasing frailty with age ...

The underlined part of the rehabilitation specialist's evidence is a vague expression of a possible future contingency but it is not an expert opinion regarding the likelihood of the need for future cost of care at KPJ Tawakal Health Centre. This vague statement of the expert witness in the circumstances of this case did not establish a case of need for future care at a health centre on a balance of probabilities. An expert witness who ventures into expression of such opinion of the need for future care at a health centre must state it clearly and specifically with his/her basis and reasons for such opinion so that his opinion can be tested by the opposite party's counsel during the course of cross-examination. It is contrary to the principle of natural justice for the court to accept an expert witness' vague statement of possible contingency in future or to give an open room for the expert to surprise the opposite counsel by withholding the basis and reasons for such opinion until the viva voce cross-examination at the full trial. Natural justice must be followed in the conduct of hearing and court proceedings (see *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 (CA) and the recent Federal Court's decision in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1.

[90] At the full trial of this case, the plaintiff did not lead/give any oral evidence of any need for future admission into a nursing home.

[91] Moreover, as this court has awarded a substantial amount for the cost of domestic help for his balance life, it would be a duplication to consider another set of cost of future nursing case.

[92] In the circumstances of this appeal, this court finds no sufficient basis for an appellate interference with the learned trial judge's factual decision to dismiss the plaintiff's claims for this item of special damages.

The cost of removal of the implant in the plaintiff's wrists

[93] In the sessions court, the learned trial judge this claim after considering the medical evidence contended in the reports by the plaintiff's first defendant's choice of orthopaedic specialists (see paras 156–159 of the grounds of judgment).

[94] The plaintiff's choice of orthopedic specialist (Dr Chee Chia Shing) who examined the plaintiff on 12 November 2014, stated that the plaintiff '... will require removal of implants in his left wrist if he develops implant related complications in the future...' (see p 448 of the record of appeal).

The highlighted part of the orthopaedic specialist's evidence is a vague expression of a possible future contingency but it is not an expert opinion regarding the likelihood of the need for future removal of the implant. This vague statement of the expert witness in the circumstances of this case did not establish a case of need for future removal of the implant on a balance of probabilities. An expert witness who ventures into expression of such opinion of the need for future removal of implant must state it clearly and specifically with his/her basis and reasons for such opinion so that his opinion can be tested by the opposite party's counsel during the course of cross-examination. It is contrary to the principle of natural justice for the court to accept an expert witness' vague statement of possible contingency in future or to give an open room for the expert to surprise the opposite counsel by withholding the basis and reasons for such opinion until the viva voce cross-examination at the full trial. Natural justice must be followed in the court proceedings (see *Nirwana Construction Sdn Bhd* case and the recent Federal Court's decision in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*).

[95] The first defendant's choice of orthopaedic specialist (Dr Vivek Ajit Singh) re-examined the plaintiff on 15 October 2018, *almost four years later*. Dr Vivek stated as follows (at p 484 of the record of appeal):

> 7 The implant need not be removed if asymptomatic.

Again, this opinion does not support the plaintiff's argument on the cost of removing implant in future.

[96] Apart from these two specialists, Dr Yeoh Poh Hong, the second and third defendants choice of specialist, also re-examined the plaintiff on 6 September 2018. He stated as follows (see p 477 of the record of appeal):

> He does not require removal of implants as this is not in accordance with routine orthopaedic practice. Such procedures are not only unnecessary but they are not without risk.

This is a clear and specific expert opinion that the plaintiff does not need a removal of the implants.

[97] In the sessions court, the plaintiff did not give or lead evidence of any problems with the implant.

[98] In the circumstances, the learned trial judge's dismissal of this claim was entirely correct and justified.

[99] In this appeal, this court finds no sufficient basis for an appellate interference with the learned trial judge's factual decision to dismiss the plaintiff's claims for this item of special damages.

Other miscellaneous items of special damages

[100] From the appeal records, these other items of special damages are miscellaneous items of small items of expenses allegedly incurred.

[101] Having perused the learned trial judge's grounds of judgments and the appeal records and having considered the parties' respective submissions, this court finds that the plaintiff has failed to prove that the learned trial judge's decisions or quantum of awards for any of these other expenses was erroneous in principle or manifestly low.

[102] In the circumstances this court finds no justification for appellate interference with the learned trial judge's factual decisions or quantum on these other expenses.

Interest on special damages

[103] In this appeal, the plaintiff has contended that the HMS erred in law by only awarding interest on special damages at the rate of 2.5%pa and not 5% (see para 7 of the memorandum of appeal).

[104] In reply, the first defendant has submitted that it is trite law that in running down cases, the appropriate rate of interest on special damages is half the rate awarded on general damages (see *Jefford and another v Gee* [1970] 1 All ER 1202); *Foong Nan v Sagadevan* [1971] 2 MLJ 24, at p 26 A-C (right hand column); *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216 at p 218 D-H (right hand column). On that basis, the first defendant has submitted that this ground of appeal has no merit.

[105] In the considered view of this court, it is within the dicretion of the trial judge in a personal injury case to award a rate of interest by following the general or settled practice of the courts in personal injury cases. This court finds no justification for appellate interference with the learned trial judge's award of the interest rates on damages.

CONCLUSION

[106] By reason of the above this court decided on 30 November 2020 that:

(a) the plaintiff's appeal on liability be dismissed;

(b) the plaintiff's appeal on quantum be allowed in part in that two items of the quantum (namely the costs of domestic help and the loss of earnings) be increased by a total gross amount of RM91,200 + RM192,000 = RM283,200 when assessed on 100% basis; and

(c) as the first defendant was 80% liable and the plaintiff 20% contributory negligence, the net total amount of increase in the judgment sum to be awarded in favour of the plaintiff against the first defendant was RM283,200 x 80% = RM226,560.

[107] After hearing all the counsel on the question of costs of appeal, this court also decided on 30 November 2020 that the combined costs of appeal and full trial payable by the first defendant to the plaintiff be assessed at RM40,000 and that the plaintiff shall pay RM10,000 to the second and third defendants as the costs of this appeal.

Appeal on liability dismissed and appeal on quantum allowed in part.

Reported by Nabilah Syahida Abdullah Salleh